Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	
	)	
1998 Biennial Regulatory Review -- Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets	)	CC Docket No. 98-183

COMMENTS OF U S WEST COMMUNICATIONS, INC.

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November 23, 1998

TABLE OF CONTENTS

Page

SUMMARY

U S WEST Communications, Inc. ("U S WEST") hereby submits its comments in the above-referenced docket supporting the Federal Communications Commission's ("Commission") proposal to allow the bundling of customer premises equipment ("CPE") or enhanced services with basic telecommunications services. Bundling, as defined by the Commission, should be permitted for interexchange services, exchange access services and local exchange services.

U S WEST agrees with the proposed elimination of unnecessary bundling restrictions, but it questions the need for a further rulemaking proceeding. Section 11 of the Telecommunications Act of 1996 ("1996 Act") establishes a presumption that regulation is not necessary and should be eliminated. In this docket, the Commission proposes eliminating the restriction on bundling CPE with interexchange services. Moreover, the Commission previously has recognized that the markets for CPE, interLATA information services and interLATA telecommunications services are fully competitive. Rather than asking for "empirical data" which supports the elimination of the current bundling restrictions, the Commission should be asking whether there is any reason to retain current bundling restrictions.

The Commission should allow carriers to bundle CPE or enhanced services with basic transmission services without imposing an additional layer of regulation. Only two simple bundling requirements are needed to protect consumers and to ensure adequate network disclosure: (1) carriers cannot offer basic transmission service without disclosing the interface between the carrier transmission service

and the CPE or enhanced service; and (2) carriers must offer a transmission service which does not include the CPE or enhanced service. These requirements are already compelled by the general common carrier obligation, the nondiscrimination requirements of Sections 201 and 202 of the Communications Act of 1934, as amended, and existing network disclosure requirements. Thus, an additional layer of regulation by the Commission is not necessary.

Finally, incumbent local exchange carriers ("LEC") and their affiliates should be subject to the same bundling rules as all other carriers. U S WEST fully supports the Commission's tentative conclusion that the Bell Operating Companies' Section 272 affiliates should be allowed to bundle CPE or enhanced services with basic transmission services to the same extent as all other carriers. Today, incumbent LECs are free to market CPE or enhanced services and telecommunications services as a package, and the Commission should not seek to alter that freedom in this docket.

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COMMENTS OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("U S WEST") hereby submits its comments in the above-referenced docket responsive to the Federal Communications Commission's ("Commission") proposal to allow the bundling of customer premises equipment ("CPE") or enhanced services with basic telecommunications services.[1] Bundling, as defined by the Commission, should be permitted for interexchange services, exchange access services and local exchange services. However, we have three significant caveats: 1) The Commission has defined "bundling" in a fairly

[1] In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, 1998 Biennial Regulatory Review -- Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets, CC Docket Nos. 96-61 and 98-183, Further Notice of Proposed Rulemaking, FCC 98-258, rel. Oct. 9, 1998 ("Further Notice").

restrictive way -- namely as the packaging of CPE and basic services for marketing purposes. All carriers may market CPE and basic services as a package today. 2) To the extent permissible bundling would include combining CPE and basic services through a proprietary interface, such action would be unwise and probably illegal. 3) Incumbent local exchange carriers ("LEC") should be subject to the same bundling rules as all other carriers, so long as incumbent LECs timely disclose new interfaces pursuant to the Commission's rules.

U S WEST agrees with the proposed elimination of unnecessary bundling restrictions where they exist, but it questions the need for a further rulemaking proceeding. More than eighteen months ago, the Commission proposed to eliminate residual restrictions on bundling CPE with interexchange services.[2] Moreover, the Commission previously concluded that the market for CPE is "very competitive,"[3] the market for interLATA information services is "fully competitive,"[4] and the market for interLATA telecommunications services is "substantially competitive."[5]

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[2] In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, Notice of Proposed Rulemaking, 11 FCC Rcd. at 7141, 7184-87 ¶¶ 84-91 (1996) ("NPRM").

[3] See, e.g., In the Matter of Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), Memorandum Opinion and Order, 8 FCC Rcd. 3891, 3891 ¶ 5 (1993).

[4] See In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, 21971-972 ¶ 136 (1996).

[5] See In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, Second Report and Order, 11 FCC Rcd. 20730, 20742-743 ¶ 21 (1996).

While U S WEST questions this conclusion as it applies to interLATA telecommunications services, it is nevertheless clear that packaged marketing of CPE and telecommunications services meets the test for forbearance pursuant to Section 11 of the Telecommunications Act of 1996 ("1996 Act").[6] The Commission should confirm this fact immediately, rather than asking for more evidence of competition[7] or pondering some type of incremental transition to a deregulatory environment.[8] The Commission should not, however, limit this action to any particular class of carrier, but must instead include all carriers in its rules.

I. SECTION 11 OF THE 1996 ACT ESTABLISHES A PRESUMPTION THAT REGULATION IS NOT NECESSARY AND SHOULD BE ELIMINATED

The Commission's approach in the Further Notice -- which asks parties to demonstrate that the level of competition in the CPE, enhanced services and interexchange markets justifies the proposed deregulation -- is completely backwards. Rather than asking for "empirical data" which supports the elimination of the current bundling restrictions,[9] the Commission should be asking whether there is any valid reason to retain the current bundling restrictions, or even whether they still exist at all. In fact, Section 11 of the 1996 Act compels an approach where the presumption is in favor of deregulation.

Historically, there was almost a presumption that regulations should be continued until it could be demonstrated conclusively that they were not useful

[6] 47 U.S.C. § 161(a)(2).

[7] Further Notice ¶ 13.

[8] Id. ¶ 14.

[9] Id. ¶ 13.

under any conceivable circumstances. The basis for the general statutory principle that the Administrative Procedure Act required no less support for deregulation than for regulation was established in the Supreme Court's 1983 Motor Vehicles decision.[10] In effect, this decision often made deregulation as difficult as regulation.

This difficult scenario was fundamentally changed by Section 11 of the 1996 Act, which establishes a statutory presumption that regulation is not necessary, and a statutory command that regulations be eliminated which are not proven to be still necessary.[11] Section 11 is nothing less than a congressional directive that the presumption which Motor Vehicles established -- that a regulation would be considered valid until it could be demonstrated on the record that it was no longer necessary -- is not valid in the telecommunications world. Rather, no regulation can remain on the books unless the record affirmatively establishes the continued necessity for the rule in question.

As the Commission noted, the Further Notice proceeding is being conducted pursuant to this new statutory structure.[12] U S WEST fully supports the Commission's deregulatory initiative, but the cautious tone of the Further Notice is at odds with the deregulatory presumption of Section 11. The Commission must eliminate any restrictions on bundling CPE or enhanced services with basic transmission services unless the record demonstrates a compelling need for continued regulation. It is U S WEST's opinion that the only legitimate restrictions

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[10] Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29 (1983).

[11] 47 U.S.C. § 161(a)(2).

[12] Further Notice ¶ 8.

on "bundling" CPE and telecommunications services lie in the area of proprietary interfaces and the potential inability of customers to purchase competitors' CPE separate from telecommunications service.

II. THE COMMISSION SHOULD PERMIT BUNDLING WITHOUT IMPOSING AN ADDITIONAL LAYER OF REGULATION

The Commission should allow all carriers to bundle CPE or enhanced services with basic transmission services. More than eighteen months ago, the Commission found it unlikely that non-dominant carriers could engage in unlawful tying arrangements if carriers were allowed to bundle CPE and interexchange services.[13] The Commission also concluded that such bundling would serve the public interest and promote competition.[14] These findings are no less true today and apply with equal force to carriers classified as "dominant." Indeed, the same rationale supports allowing the bundling of CPE or enhanced services with exchange access services or local exchange services.

In its April 1996 comments, U S WEST laid out a sensible approach to bundling that provides maximum flexibility and minimizes regulation.[15] Only two simple bundling requirements are needed to protect consumers and to ensure adequate network disclosure: (1) carriers cannot offer basic transmission service without disclosing the interface between the carrier transmission service and the CPE or enhanced service; and (2) carriers must offer a transmission service which

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[13] NPRM, 11 FCC Rcd. at 7186 ¶ 88.

[14] Id.

[15] U S WEST, Inc. Comments, CC Docket No. 96-61, filed Apr. 25, 1996.

does not include the CPE or enhanced service. These requirements are already compelled by the general common carrier obligation, the statutory requirements of Sections 201 and 202 of the Communications Act of 1934, as amended (the "Act"), and existing network disclosure requirements. Thus, an additional layer of regulation by the Commission is not necessary.

U S WEST submits that open interfaces are an essential component of a common carrier service. The bundling of CPE or enhanced services with basic transmission services without continuing to require the public disclosure of common carrier interfaces could have significant harmful consequences. Specifically, such bundling would result in the development of proprietary common carrier transmission systems, accessible only by those customers who agreed to purchase the specific CPE or enhanced service permitting such access. If this were to happen, the CPE or enhanced service would become, for all intents and purposes, part of the common carrier service -- if a customer cannot purchase the common carrier service without the CPE or enhanced service, then these services would be subsumed into the overall basic transmission service.

The Commission need not establish any new regulations to ensure that open interfaces are utilized. Permitting a common carrier to utilize a proprietary interface is anathema to the notion that common carriers must hold themselves out to the public. In addition, Sections 201 and 202 of the Act require that common carrier service cannot be provided on terms that are unjust, unreasonable, or

unreasonably discriminatory.[16] Moreover, the network disclosure rules adopted by the Commission pursuant to Section 251(c) of the 1996 Act for incumbent LECs and the less specific All Carrier Rule require that network interfaces be disclosed in a timely fashion. With these protections in place, there is no need for the Commission to require a uniform interface, so long as network interfaces remain open.

U S WEST also believes that, consistent with the approach taken to CPE and cellular service bundling, it makes sense to require that all carriers make basic transmission services available without the bundled CPE or enhanced services.[17] The Commission should continue to maintain a clear distinction between basic transmission services and CPE or enhanced services for regulatory purposes. An important benefit of this approach is that it allows the Commission to lift the bundling restriction without extending the reach of its common carrier regulation to CPE (i.e., that CPE remains unregulated and untariffed).[18] In effect, the CPE or enhanced service would continue to be priced separately from the basic transmission service, but a package discount could be given for customers who purchase both products.[19]

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[16] 47 U.S.C. §§ 201(b), 202(a).

[17] In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service, Report and Order, 7 FCC Rcd. 4028 (1992).

[18] See Further Notice ¶ 17. Likewise, allowing CPE to be bundled with local exchange service does not extend state jurisdiction over CPE. See id. ¶ 30.

[19] Id. ¶ 17. The "package discount" approach is commonly used in the industry and should address IDCMA's concern that bundling arrangements could violate Sections 201 and 202. See id. ¶ 16.

Requiring the continued availability of basic transmission services without bundled CPE or enhanced services also addresses the Commission's concern about unlawful "tying arrangements."[20] In particular, carriers will not have the ability to require a basic transmission service customer to purchase carrier-provided CPE or enhanced services, which is the most likely scenario for a tying arrangement. In any event, a threshold requirement for an illegal tying arrangement is some special ability on the part of the seller (i.e., market power) to force customers to do something they would not do in a competitive market.[21] The markets for CPE and enhanced services are sufficiently competitive that it would be extremely difficult, if not impossible, for any carriers to successfully exercise market power. If necessary, the antitrust laws would provide more than adequate enforcement power to prevent illegal tying arrangements.

That said, U S WEST continues to be troubled concerning the Commission's apparent assumption that it needs to conduct a rulemaking before carriers can package CPE or enhanced services with telecommunications services in the manner described above. If the Commission is really contemplating elimination of the requirement that CPE or enhanced services and telecommunications services be sold in a separable manner, such action would violate the nature of common carriage. On the other hand, if the Commission is merely proposing to permit joint marketing of CPE or enhanced services and telecommunications services, it is

[20] U S WEST distinguishes "tying," with its antitrust implications, from the more neutral terms "bundling" or "packaging."

[21] Further Notice n.37 (citing Jefferson Parish, 466 U.S. 2, 16-18 (1984)).

simply proposing to continue the rules now in place (albeit while calling such action deregulation). We submit that this docket highlights what the 1996 Act really contemplated -- that the Commission must start from the assumption that all regulations are unnecessary and construct a streamlined regulatory structure under which only those regulations which are truly necessary are enacted. In this docket, it really appears that the Commission is conducting a regulatory proceeding wherein the proponents of a deregulatory environment which very much resembles the status quo must demonstrate that the market is functioning properly. The presumptions, and the nature of future deregulatory proceedings, must all start with a basis of minimal regulation, something which appears to be the opposite of at least some interpretations of the instant rulemaking.

III. INCUMBENT LECS AND THEIR AFFILIATES SHOULD BE SUBJECT TO THE SAME BUNDLING RULES AS ALL OTHER CARRIERS

U S WEST fully supports the Commission's tentative conclusion that the Bell Operating Companies' Section 272 affiliates should be allowed to bundle CPE or enhanced services with basic transmission services to the same extent as all other non-dominant interexchange carriers.[22] The Commission previously held Section 272 affiliates should be classified as non-dominant interexchange carriers. In addition, the Commission has recognized that the markets for CPE, interLATA information services, and interLATA telecommunications services are all competitive. Thus, there is no conceivable basis to impose greater bundling restrictions on Section 272 affiliates than other carriers.

[22] Id. ¶ 25.

However, it must be cautioned that this docket is not the appropriate forum in which to impose oppressive regulations on incumbent LECs. Incumbent LECs are today fully free to market CPE or enhanced services with telecommunications services as a package, and the Commission cannot, and should not, seek to alter that freedom in this docket. A Section 272 subsidiary, on the other hand, can go further, because, as a non-dominant carrier, it will be exempt from dominant carrier tariff filing and network disclosure rules. For the most part, however, practically all marketing freedoms proposed in the Further Notice are already available to dominant and non-dominant carriers alike.

IV. CONCLUSION

The premise of the Further Notice is correct -- the Commission should not interfere with carrier marketing of CPE or enhanced services unless a truly good reason exists for such interference. The necessity of the rulemaking itself is less clear -- all carriers have the ability to market CPE or enhanced services with telecommunications services as a package today, subject to some minimal restrictions, some of which fall only on dominant carriers, but some of which derive from the very nature of common carriage itself. This rulemaking, despite its good intentions, seems to have the potential to be completely antithetical to the intent of the 1996 Act, which envisions a rapid movement to a regulatory structure in which only necessary rules are retained. The Commission should review this docket at least in part to determine why it is necessary in the first place, and move quickly to

establish a structure in which unnecessary rules can be eliminated quickly and efficiently.

Respectfully submitted,

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November 23, 1998

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that on this 23rd day of November, 1998, I have caused the foregoing **COMMENTS OF U S WEST COMMUNICATIONS, INC.** to be filed electronically with the FCC via the Electronic Comment Filing System* and a hard copy served by hand on the following organization:

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, DC 20037

Richard Grozier
Richard Grozier

*Since this document was filed electronically via the FCC's Electronic Comment Filing System, pursuant to paragraph 30 of the April 6, 1998 Report and Order in GC Docket No. 97-113 (and the attached rules, which were effective June 30, 1998) and the October 9, 1998 Further Notice of Proposed Rulemaking in CC Docket Nos. 96-61 and 98-183, FCC 98-258, no additional hard or electronic copies of this filing were served on FCC staff.

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